

U.S. DEPARTMENT OF LABOR

**SECRETARY OF LABOR
WASHINGTON, D.C.**

In the Matter of
INDIAN HUMAN RESOURCE
CENTER, INC.

Case No. 83-JTP-4

FINAL DECISION AND ORDER

BACKGROUND

The issue in this case is whether the Indian Human Resource Center, Inc. (IHRC) is entitled to attorney's fees and costs pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 as amended by Pub. L. No. 99-80 (August 5, 1985). IHRC is a private, non-profit service provider of employment and training services in the San Diego, California area. Through 1983, IHRC had been selected as a grantee provider of these services to participants in the Comprehensive Employment and Training Act (CETA)^{1/} § 302 Indian and Native American programs in the San Diego area. In 1983, the Division of Indian and Native American Programs (DINAP) of the Employment and Training Administration (ETA) of the Department of Labor published a Solicitation for Notices of Intent (SNOI) in the Federal Register.^{2/} The SNOI notified interested organizations of the requirements and procedures to be followed in submitting Notices of Intent to apply for Program Year 1984 funds^{3/} supporting the Indian

^{1/} 29 U.S.C. §§ 801-999 (Supp. V 1981), repealed 1982.

^{2/} 48 Fed. Reg. 23,937-23,939, May 27, 1983.

^{3/} The 1984 Program Year commenced on July 1, 1984, as contrasted to Fiscal Year (October 1, 1983) or Calendar Year dates.

and Native American programs under the auspices of the Job Training Partnership Act (JTPA) 29 U.S.C. §§ 1501-1781 (1982). Congress repealed CETA and replaced it with JTPA as the vehicle **to** provide job training and related services to unemployed and underemployed Americans. JTPA Section 401 specifically targets Indians and Native Americans as its **beneficiaries**.^{4/}

Subsequent to a review of the NOI's received by DINAP in response to its SNOI, DINAP selected the California Indian Manpower Consortium (CIMC) as the grantee provider of services for the 1984 Program Year in the San Diego area. IHRC requested reconsideration of its nonselection and when this was denied, requested a hearing before the Office of Administrative Law Judges. A hearing was held on February 6 and 8, 1984, before Administrative Law Judge (ALJ) E. Earl Thomas. On May 14, 1984, ALJ Thomas issued a Decision and Order remanding the matter to the Grant Officer to reconsider the applications of both IHRC and CIMC. In doing so, he explicitly found that the Grant Officer's nonselection of IHRC was "arbitrary and capricious and an abuse of his discretion, which constitutes a violation of JTPA."^{5/}

The Grant Officer did not appeal the **ALJ's** decision, and reconsidered the selection of the San Diego area grantee

^{4/} 29 U.S.C. § 1671 (1982)

^{5/} Decision and Order, In the Matter of Indian Human Resource Center, Inc., 83-JTP-4, May 14, 1984, at 12 (D and O).

provider. On June 29, 1984, the Grant Officer changed his earlier decision and designated IHRC as the grantee provider of services for the San Diego area for the JTPA § 401 program.

IHRC had filed an application for attorney's fees and costs pursuant to EAJA in June, presumably based on its prevailing on the remand, and amended its application in July, 1984, after its selection as grantee.

On November 15, 1984, the ALJ awarded IHRC \$6,428.70 in attorney's fees and costs. The Grant Officer excepted to the award, and the Secretary asserted jurisdiction on December 31, 1984.

• DISCUSSION

The recent amendments to EAJA^{6/} clarify the meaning of the phrase "position of the agency"^{7/} to be inclusive of the underlying action which gave rise to the adversary adjudication as well as the litigation position of the agency. The underlying action of the agency in this case was the method used by DINAP to nonselect IHRC as the designated grantee for the Indian and Native American program in San Diego County. After a hearing, the ALJ found the method used as "arbitrary and capricious."^{8/} The agency did not challenge the decision

6/ Pub. L. No. 99-80 (August 5, 1985)

7/ 5. U.S.C. § 504(b)(1)(E) (1985)

8/ D and O at 12.

or the **ALJ's** finding that its method was arbitrary and capricious. Subsequently, the Grant Officer selected IHRC as the grantee. The record is silent regarding the Grant Officer's reasons for reversing his choice. It is not possible to conclude whether the Grant Officer tacitly agreed with the characterization of the previous method as "arbitrary and capricious" or if he still relied on the competitive standard used in previously awarding the grant to CIMC. The subsequent adoption and publication by ETA of regulations for a competitive selection process for Indian and Native American programs similar to the one used in this case would indicate that the method originally utilized was satisfactory.^{9/} However, the failure of the Grant Officer to appeal the **ALJ's** original decision precludes a determination as to the substantial justification of the Grant Officer's action in the original non-designation of IHRC. Accepting the **ALJ's** decision, therefore, as conclusive, I conclude that IHRC is entitled to attorney's fees and costs pursuant to EAJA.

The ALJ awarded to IHRC attorney's fees in the amount of \$85.00 per hour. I find this to be contrary to the Department's regulations concerning allowable fees and expenses.^{10/} The \$75.00 per hour limitation is established by the statute at

^{9/} 20 C.F.R. § 632.11 (1985)

^{10/} 29 C.F.R. § 16.107(c) (1985), provides that "[n]o award under these rules for the fee of attorney or agent may exceed \$75.00 per hour."

5 U.S.C. 504(b) (1)(A) as follows:

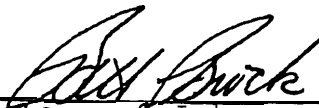
[A]ttorney or agent fees shall not be awarded in excess of \$75 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as limited availability of qualified attorneys or agents for the proceeding involved, justifies a higher fee; (emphasis supplied).

The Department has not provided for a higher attorney% fee award. Although the subsection in the Department's regulations following the \$75.00 per hour attorney's fees limitation directs the adjudicative officer to consider a number of factors in determining the reasonableness of fees **sought,**^{11/} I deem these factors directions to be used in establishing the fees up to the maximum allowed for attorneys and expert witnesses, as well as the "reasonable cost of any study, analysis, **engi-**neering report test or project necessary for the preparation of the party's case;" 29 C.F.R. § 16.107(a)(2) (1985). However, IHRC is entitled to attorney's fees for representation in contesting this present appeal, as well its reasonable costs as defined by § 16.107(a)(2) necessary to pursue this action.

Accordingly, I hereby remand this case to the Office of Administrative Law Judges for the purpose of receiving, pursuant to 29 C.F.R. § 16.201-16.203 (1985), additional information from the attorneys for IHRC detailing the additional compensable time expended on behalf of IHRC, plus such permitted costs as were necessary to support the response to the Grant Officer's appeal of the award of attorney's fees.

^{11/} 29 C.F.R. § 16.107(d) (1985).

However, the maximum compensation to be allowed for attorney's fees is not to exceed \$75.00 per hour.



Secretary of Labor

Dated: JAN 2 1986
Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: Indian Human Resources Center, Inc.

Case No.: 83-JTP-4

Document : Decision and Order

This is to certify that a copy of the above-mentioned document
was sent to the following persons on JAN 2 1986.

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